No. 14,077

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY, a corporation,
Appellee.

Brief for Appellant Southern Pacific Company

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INTERSTATE COMMERCE COMMISSION REGULATIONS

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STATEMENT AS TO JURISDICTION

This appeal is from a judgment rendered by the District Court of the United States for the District of Oregon in an action commenced in that court by appellee, The Martin Brothers Box Company, a corporation, to set aside an order of appellant Interstate Commerce Commission which dismissed a complaint seeking an award of reparation from appellant Southern Pacific Company.[1] As appears from the

1. The parties are herein referred to at times as Martin Brothers, the Commission, and Southern Pacific, respectively. In various quotations Martin Brothers is referred to as complainant and Southern Pacific as defendant.

amended petition filed by Martin Brothers with the District Court (R. 3), the jurisdiction of that court was invoked under Sections 1336 and 2331, Title 28, United States Code, *inter alia*.

The jurisdiction of the Court of Appeals to review the judgment of the District Court (R. 74) is based upon Section 225, Title 28, United States Code, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under Section 345, Title 28, United States Code. Jurisdiction to review the judgment of a district court in the same type of action was exercised by the Court of Appeals in *United States v. Interstate Com. Commn.* (C.A., D.C. 1952), 198 F.2d 958, cert. den. 344 U.S. 893.

STATEMENT OF THE CASE

Martin Brothers, on October 14, 1947, filed with the Commission a complaint alleging that between January 1, 1947, and September 30, 1947 (a period of general car shortage), Southern Pacific failed to furnish it with adequate cars for the transportation of property (wire-bound boxes, veneer and lumber) from Oakland, Oregon, to various destinations in other states, in violation of Sections 1 and 3 of the Interstate Commerce Act. The sole relief sought in the complaint was an award of reparation in the amount of $2,259,000 (R. 77). An answer denying the alleged violations of the Interstate Commerce Act was filed with the Commission by Southern Pacific (R. 81).

A four-day hearing on the complaint was held at Portland, Oregon, commencing February 20, 1950, at which time extensive oral and written evidence was received. The case presented by Martin Brothers was based, not on the failure

of Southern Pacific to supply all the cars specifically ordered, but rather on the alleged failure to supply cars not specifically ordered. Martin Brothers' basic contention was that Southern Pacific should have furnished it 8.4 (eight and four-tenths) cars on each working day of the complaint period (R. 775) rather than the number of cars for which Martin Brothers placed specific daily car orders during that period. An examiner's proposed report was issued (R. 84), finding that the complaint period was a time of general car shortage for which Southern Pacific was not accountable (R. 92-94), but recommending that the Commission find that during that period Southern Pacific "failed in its duty to provide and furnish transportation from complainant's plant at Oakland upon reasonable request therefor". The examiner further recommended that Martin Brothers be awarded reparation in the amount of $135,220.56, with interest (R. 106).

After the issuance of the examiner's proposed report, Martin Brothers and Southern Pacific filed exceptions thereto, and then each subsequently filed a reply to the exceptions of the other. Oral argument was then held before Division 3 of the Commission at Washington, D. C. (R. 656-683). Thereafter, on March 12, 1951, Division 3 issued its report (R. 108) (280 I.C.C. 395) in which it held:

> "We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act in furnishing or not furnishing cars to complainant at Oakland, Oreg.; or that defendant subjected complainant to any undue prejudice in violation of section 3." (R. 126)

In its report the Commission also made the following subordinate findings, as had the examiner in the proposed report:

"After the close of World War II, the nation as a whole experienced a great industrial development, and during 1947 the nation's railroads experienced, for the first time since 1920, except in the war period, an average daily shortage of cars. During most of the period between World War I and World War II, they had on hand large surpluses of cars, the worst year being 1932 when the average daily surplus amounted to 694,022 cars. During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.

"In addition to the increases in general traffic on the defendant's lines during and after World War II, it also experienced a tremendous increase in forest products traffic. Before World War II western Washington was the principal producing area of softwood-lumber forest products, but during and after the war western Oregon became the principal producing area of these products. By 1947 the softwood lumber production of western Oregon had risen to nearly 6 billion board feet a year, whereas that in western Washington was only about 3 billion board feet. The defendant is the principal carrier in Oregon, and the number of cars loaded with forest products on its Portland division increased from 80,675 in 1939 to 162,418 in 1947.

"Another factor affecting the defendant's car supply in 1947 was a reversal of the main traffic flow over its lines after the war. During the war the main flow was

westward, but with the close of hostilities in the Pacific theater, the main flow became eastward. During 1947 the defendant originated and delivered to its connecting carriers many more loaded cars than it received from such connections. During the war and postwar periods it exerted extensive efforts to conserve and increase its facilities. *On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint.*" (Emphasis supplied.) (R. 116-118)

In its report the Commission made in addition the following subordinate findings and statements of law:

"Complainant alleges violations of section 1(4), section 1(11) and section 3(1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers, but at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. *Penna. R.R. v. Puritan Coal Co.*, 237 U.S. 121 and *Midland Valley R. Co. v. Barkley*, 276 U.S. 482. Considering the above, in the light of the facts of this

> record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged. Moreover, the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court. *Lignum-Vitae Products Corp. v. Alabama G.S.R. Co.,* 268 I.C.C. 599, 608." (R. 125-126)

Contemporaneously with the issuance of its report the Commission entered an order dismissing the complaint of Martin Brothers (R. 127).

Thereupon, Martin Brothers filed with the Commission a petition for reconsideration. Southern Pacific filed a reply to that petition, and on July 30, 1951, the entire Commission by a vote of 10 to 0[2] denied that petition for reconsideration (R. 128).

On November 27, 1951, Martin Brothers filed with the District Court of the United States for the District of Oregon a petition to enjoin and set aside the order of the Commission dismissing the complaint. That petition named the Commission and the United States as defendants. On February 11, 1952, the District Court duly issued its order permitting Southern Pacific to intervene as a defendant in the action (R. 35). On September 29, 1952, an amended petition was filed by Martin Brothers (R. 3). The trial of the action was based solely upon the record before the Commission, no additional evidence being offered or received on behalf of any party.

The judgment of the District Court entered August 25, 1953, was that the report and order of the Commission of

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2. Commissioner Richard F. Mitchell did not participate.

March 12, 1951, denying reparation to Martin Brothers, and the order of the Commission of July 30, 1951, denying reconsideration, be "annulled, vacated, suspended, and set aside" (R. 74). The findings of fact and conclusions of law entered by the Court also on August 25, 1953, adopted by reference its previously issued opinion of May 15, 1953 (R. 40). That opinion (R. 42) does not hold that the Commission's ultimate findings are insufficient in form or that the Commission misinterpreted or misapplied the law; the opinion rather rests on the sole ground that the Commission's report and order have an insufficient evidentiary basis, i.e., that the evidence in the record before the Commission is such as to justify no other order from the Commission than one awarding reparation to Martin Brothers. Therefore, the only questions presented in this appeal are:

(1) Whether the District Court, in considering the adequacy of the evidentiary basis of the Commission's report and order, could properly do more than to determine whether the Commission's findings of ultimate fact are supported by substantial evidence.

(2) Whether the record contains substantial evidence to support the Commission's ultimate finding that Martin Brothers failed to establish that Southern Pacific engaged in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act.

(3) Whether the record contains substantial evidence to support the Commission's ultimate finding that Martin Brothers failed to establish that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3 of the Interstate Commerce Act.

SPECIFICATION OF ERRORS

The errors in the District Court upon which appellant relies are the following:

1. The District Court erred in attempting to weigh the evidentiary facts in the record made before the Commission and failing to limit its function to determining whether the Commission's findings of ultimate-fact were supported by substantial evidence.

2. The District Court erred in failing to conclude that the record contains substantial evidence to support the Commission's finding of ultimate fact that Martin Brothers failed to establish that Southern Pacific engaged in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act.

3. The District Court erred in failing to conclude that the record contains substantial evidence to support the Commission's finding of ultimate fact that Southern Pacific did not subject Martin Brothers to any undue prejudice in violation of Section 3 of the Interstate Commerce Act.

SUMMARY OF ARGUMENT

I

The holdings in the Commission's report, that Martin Brothers failed to establish that Southern Pacific during the complaint period engaged in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Interstate Commerce Act in furnishing or not furnishing cars to Martin Brothers at Oakland, Oregon, or that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3, are not conclusions of law but are findings of ultimate fact. In reviewing the record before the Commission it is only appropriate for a court to determine whether the record contains substantial evidence to support

such findings of ultimate fact. For a court to do more is in violation of the established doctrine of administrative finality.

II

The record contains substantial evidence to support the Commission's ultimate finding that Martin Brothers failed to establish that Southern Pacific engaged in any unreasonable or otherwise unlawful practice in violation of Section 1. Section 1 makes it the duty of a carrier to furnish cars only upon reasonable request. Martin Brothers failed to make reasonable request for any more cars than it actually received during the complaint period, having received all the cars for which it placed specific oral or written daily car orders. It was the general practice of Southern Pacific to place only cars for which it received specific oral or written daily car orders—a practice of which Martin Brothers had knowledge and which Martin Brothers had been specifically admonished to observe, and did observe by placing specific oral or written daily orders for the cars which it did receive during the complaint period. That general practice is necessary in order to enable a rail carrier efficiently to distribute cars during a period of general car shortage, and is supported by previous decisions of the Commission and the courts.

III

The Commission's finding that Martin Brothers failed to establish that Southern Pacific subjected it to any undue prejudice in violation of Section 3 is supported by substantial evidence. Southern Pacific furnished other shippers with no more cars than those for which they placed specific oral or written daily orders. As Martin Brothers received all the cars for which it placed specific oral or written daily

orders, it received treatment equal to that received by other shippers and was not subjected to any undue prejudice.

IV

The record contains substantial evidence that Martin Brothers was not damaged as a result of receiving less than 8.4 cars on each of its working days comprising the complaint period. During the complaint period Martin Brothers held idle and empty on its spur track an aggregate of some 200 cars for periods ranging from three to eight days (excluding Sundays and holidays). And Martin Brothers showed *by one of its own exhibits* that during the complaint period it cancelled several car orders it had outstanding.

ARGUMENT

A. The Only Question to Be Determined by the District Court Was Whether There Was Any Substantial Evidence to Support the Commission's Findings of Ultimate Fact.

Martin Brothers, in its complaint filed with the Commission, alleged that Southern Pacific failed to provide car service as required in Sections 1(4) and 1(11) of the Interstate Commerce Act, and subjected it to undue and unreasonable prejudice and disadvantage in violation of Section 3 of that Act (49 U.S.C., Secs. 1(4), 1(11) and 3). These allegations, which were denied by Southern Pacific, were determined by the Commission in its report as follows:

> "We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act, in furnishing or not furnishing cars to complainant at Oakland, Oreg.; or that defendant subjected complainant to any undue prejudice in violation of section 3."

It is clear that the aforesaid statements in the Commission's report constitute determinations of questions of fact within the exclusive judgment and discretion of the Interstate Commerce Commission as confided by Congress.

Neither Section 1(4), Section 1(11) nor Section 3 contains any definition of what is reasonable or unreasonable or what constitutes an undue or unreasonable prejudice or disadvantage.[3]

Accordingly, it has been repeatedly held by the Supreme Court that whether a particular rate, regulation or practice is "reasonable" or "unduly or unreasonably prejudicial or disadvantageous" is a question of fact confided by Congress to the exclusive judgment and discretion of the Interstate Commerce Commission. Findings by the Commission determining such questions are not to be disturbed by the court except upon a showing that they are unsupported by substantial evidence or for some reason amount to an abuse of power. *Manufacturers Ry. Co. v. United States* (1918), 246 U.S. 457, 481; *Nashville Ry. v. Tennessee* (1923), 262 U.S. 318, 322; *Western Papermakers Chem. Co. v. United States*

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3. Section 1(4) provides:

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, * * *."

Section 1(11) provides:

"It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 3 provides:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * in any respect whatsoever; or to subject any particular person, * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *."

(1926), 271 U.S. 268, 271; *Virginian Ry. Co. v. United States* (1926), 272 U.S. 658, 665-666; *Assigned Car Cases* (1927), 274 U.S. 564, 580-581; *United States v. Chicago Heights Trucking Co.* (1940), 310 U.S. 344, 352-353; *Board of Trade v. United States* (1942), 314 U.S. 534, 546; *Swift & Co. v. United States* (1942), 316 U.S. 216, 230. The following quotations illustrate applications of this doctrine of administrative finality:

> "The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."
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> *United States v. Chicago Heights Trucking Co., supra,* 310 U.S. 344, 352-353.

> "Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §§ 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission,* 162 U.S. 197, 219, 220; *Manufacturers Ry. Co. v. United States,* 246 U.S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, *as a question of fact,* on the matters proved in the particular case.

Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic."

Nashville Ry. v. Tennessee, supra, 262 U.S. 318, 322.

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience'. *Illinois Central R.R. Co. v. Interstate Commerce Commission,* 206 U.S. 441, 454. *This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions,* or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission v. Union Pacific R.R. Co.,* 222 U.S. 541." (Emphasis supplied.)

Virginian Ry. Co. v. United States, supra, 272 U.S. 658, 665-666.

"It is not for courts to weigh the evidence introduced before the Commission. *Western Papermakers' Chemical Co. v. United States,* 271 U.S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission v. Illinois Central R.R. Co.,* 215 U.S. 452, 471; *Skinner & Eddy Corporation v. United States,* 249 U.S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States v. New River Co.,* 265 U.S. 533, 542. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R.R. Co. v. Interstate Commerce Commission,* 206 U.S. 441, 454."

Assigned Car Cases, supra, 274 U.S. 564, 580-581.

The doctrine of administrative finality has been specifically applied to decisions of the Interstate Commerce Commission, respecting car supply and distribution. *St. Louis, etc., Ry. Co. v. Brownsville Dist.* (1938), 304 U.S. 295, 301; *Pennsylvania R. Co. v. Puritan Coal Min. Co.* (1915), 237 U.S. 121, 134; *Midland Valley R. Co. v. Excelsior Coal Co.* (C.C.A. 8, 1936), 86 F.2d 177, 181. Particularly the question of reasonableness of a rule of car distribution is administrative in character, calling for the exercise of the specialized powers and discretion conferred by Congress upon the Commission. *Morrisdale Coal Co. v. Pennsylvania R. Co.* (1913), 230 U.S. 304, 313.

The District Court, however, in its opinion, after describing the findings of ultimate fact made by the Commission as "legal conclusions", proceeds to determine whether they are proper by purportedly analyzing and evaluating various statements of *evidentiary* facts set forth in the Commission's report (which the Court incorrectly describes as "findings").[4] The Court thus not only attempts to weigh evidentiary facts but fails to consider any evidence of record not specifically set forth in the Commission's report. No court has ever held that, in determining whether the findings of an administrative agency have evidentiary support, the reviewing court should look only to the evidence set forth in the report of the administrative agency. The rule of that judicial review is, rather, reflected in the court's opinion in *Johnston Seed Co. v. United States* (C.A.

4. The Supreme Court has emphasized that the essential content of a report of the Commission consists of the findings of *ultimate* fact and not its mere statements of *evidentiary* or primary facts. *Meeker & Co. v. Lehigh Valley R. Co.* (1915), 236 U.S. 412, 427; *Mills v. Lehigh Valley R. Co.* (1915), 238 U.S. 473, 477.

10, 1951), 191 F.2d 228, in which the court upheld a decision of the Interstate Commerce Commission denying an award of reparation. The court there said (p. 231):

> "Complaint is made that the findings of the Commission were directly contrary to the evidence, and were arbitrary and capricious. The argument in support of the contention is that the finding that the rates charged on mung beans were not shown to have been unreasonable is contrary to the evidence. In view of the dissimilarity among cases of this kind involving reparation, no good purpose would be served by detailing the evidence at length. *The finding was in the nature of a factual conclusion based upon an evaluation of the entire record. It was not a finding susceptible of demonstration with arithmetical exactness by specific reference to uncontroverted evidence. But it represented the considered judgment of the Commission.* We are unable to say that it was contrary to the evidence, that it was not adequately supported by substantial evidence, or that it was arbitrary or capricious. And in a proceeding of this kind it is not the province of the court to substitute its judgment for that of the Commission in respect to a question of this nature. Expediency or wisdom of the order are not elements for consideration. *The field for exertion of the judicial function is exhausted when it appears that there was rational basis for the intelligent finding or conclusion of the Commission.* [Citing cases.]" (Emphasis supplied.)

It is therefore clear that the District Court erred in attempting to do more than merely determine whether there was any substantial evidence to support the Commission's findings of ultimate fact. We shall now demonstrate that each of the Commission's findings of ultimate fact is supported by substantial evidence.

B. The Record Contains Substantial Evidence to Support the Commission's Ultimate Finding that Southern Pacific Did Not Engage in Any Unreasonable Practice in Violation of Section 1 of the Interstate Commerce Act.

The Commission's finding of ultimate fact respecting the alleged violation of Section 1 was "that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged in violation of Section 1 of the Act in furnishing or not furnishing cars to complainant at Oakland, Oreg." The record contains substantial evidence to support this finding of ultimate fact.

The alleged violation of Section 1 was pleaded as follows by Martin Brothers in its complaint filed with the Commission (par. III):

> "That the defendant has failed to provide complainant with transportation of property from Oakland, Oregon, to various destinations *upon reasonable request* therefor and to furnish adequate car service to complainant in violation of Section 1(4) and (11) of the Interstate Commerce Act." (Emphasis supplied.)

This statement by Martin Brothers in its complaint is consistent with the Interstate Commerce Act, which clearly makes the placing of a reasonable request with a common carrier a condition precedent to a person's right to be furnished transportation. Section 1(4) provides:

> "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, * * *."

And so the Commission stated at an early time in *Vulcan Coal & M. Co. v. Illinois Cent. R. Co.* (1915), 33 I.C.C. 52, 64:

> "However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that *upon reasonable request* it shall be the duty of every carrier to furnish cars." (Emphasis by the Commission.)

The Commission, in the cited proceeding, also said (p. 64):

> "* * * one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction."

The record contains substantial evidence that Martin Brothers made no "reasonable" requests for the furnishing of any more cars than it actually received during the nine-month complaint period. Criteria of what is a "reasonable" request for the furnishing of cars consist of the general practice followed by shippers in ordering cars, the enforcement of car demurrage rules, the practical factors of car distribution, and previous decisions of the Interstate Commerce Commission and the courts. All of these criteria establish that, to be reasonable, requests for cars should be sufficiently specific to reveal to the rail carrier the exact number and type of cars desired by the maker of the request on a particular day.

It was not, and is not, the practice of Southern Pacific to furnish cars, either to shippers in general or to lumber shippers in Oregon in particular, in response to general advance statements or representations made by shippers concerning their potential shipping capacities or their probable future shipping needs. The record shows that specifically during

the complaint period the general practice of Southern Pacific was to furnish cars to lumber shippers in Oregon only if it had received an "order" for the placing of a definite number and type of cars on a particular day. Witness G. M. Leslie, Car Service Agent of Southern Pacific Company for the Portland Division,[5] testified that cars would be furnished only after car orders had been placed (R. 565); and Martin Brothers in its own exhibits showed that six other Oregon lumber shippers,[6] as well as Martin Brothers itself, received only cars for which they had placed specific car orders (R. 704-759).

During the complaint period there was no requirement that car orders had to be in writing, and it was the practice of shippers to place their specific, day-to-day orders orally as well as in writing. Shippers submitting their orders in writing had available for that purpose pads of printed car-order forms distributed by Southern Pacific. When shippers submitted car orders orally, the orders were reduced to writing on these forms by the agent of Southern Pacific receiving them (R. 589-590). The reduction of oral car orders to writing by rail carriers is contemplated in the rules prescribed by the Interstate Commerce Commission, effective June 1, 1945, in *Regulations to Govern the Destruction of Records of Steam Railroads,* Item 161 of which requires that "Records of Cars Ordered, Furnished and

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5. The Portland Division includes practically all the Oregon lines of Southern Pacific upon which lumber shippers are located.

6. Jones Lumber Company, Portland, Oregon; Guistina Lumber Company, Eugene, Oregon; Zellner Lumber Company, Eugene, Oregon; Eugene Fruit Growers, Eugene, Oregon; Oregon Pulp & Paper Company, Salem, Oregon; Interstate Terminals, Portland, Oregon.

Loaded" be retained three years, and "Reports of Unfilled Orders" be retained one year.[7]

The record further shows that Martin Brothers itself followed the practice of placing specific day-to-day orders, either in writing or orally by telephone, for cars during the complaint period (R. 589). Most of the written orders placed by Martin Brothers were executed on the printed car-order forms by its employee Mr. R. L. Stapleton at the offices of Martin Brothers, *prior to his receiving any information as to what cars might be available,* and then delivered to the agent of Southern Pacific at Oakland (R. 638).

Not only does this conformity by Martin Brothers with the general practice of placing specific orders for cars establish a definite knowledge of Martin Brothers of the car-order practice and an acquiescence by Martin Brothers in that practice, *but the record shows that prior to the complaint period Martin Brothers was expressly admonished to place specific car orders.* Witness F. C. Nelson, Freight Traffic Manager of Southern Pacific at Portland, Oregon, testified that, in an extended conversation respecting the car-supply situation, held at his office in August, 1946, with Mr. R. G. Holland, representing Martin Brothers, he specifically told Mr. Holland "to be sure to have his people place car orders for the cars" (R. 610). This statement was not denied by Mr. Holland, who appeared as a witness at the hearing (R. 275), and stands completely uncontradicted.

Unless requests for the furnishing of cars are sufficiently specific to reveal the exact number and type of cars required

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7. This order was published in the Federal Register (33 CFR, 1945 Supp., 5.7, § 110.12, p. 4511) and is thus subject to judicial notice (44 U.S.C., § 307).

by a shipper on a particular day, it would not be possible to enforce effectively car demurrage rules. If a rail carrier were required to place empty cars in the absence of specific car orders, on the mere basis of the shipper's general potential need, and it then developed that such shipper did not actually need those cars, the rail carrier would have no right to collect demurrage and "nonuse" charges.[8] The relationship between car orders and accrual of demurrage charges was described by witness R. J. Robinson as follows (R. 587):

> "Q. [By Mr. Schafer] I note throughout this sheaf of original car orders[9] notations in blue pencil; you don't know who put those notations in there, do you?
>
> A. I believe the auditors of the Pacific Car Demurrage Bureau—they are required to go to the various

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8. Although not of record in this case, it is undisputed, and a matter of public record, that the applicable demurrage tariff provides that demurrage charges do not accrue on empty cars that are placed on a shipper's special track *until those cars have been specifically ordered by the shipper* (Rules Nos. 1 and 6 of B. T. Jones' Tariffs Nos. 4-Y and 4-Z on file with the Commission, I.C.C. Nos. 3963 and 4257). So, also, there is tariff provision that when empty cars are placed pursuant to order at points in Oregon and not used, "the party ordering same will be subject to a charge of $9.66 per car when moved from another station, or $4.45 per car when moved from a point within yard limits." (Item 1590 of Southern Pacific Company Terminal Tariff No. 230-K on file with the Commission, I.C.C. No. 4960.)

If a rail carrier were to place empty cars on the basis not of specific car orders but rather of the potential and fluctuating manufacturing capacity of a particular shipper, that shipper would be able to escape the payment of these demurrage and "nonuse" charges, the result of which would be to handicap seriously the efforts of rail carriers to secure a maximum use of equipment.

9. This reference by counsel for Martin Brothers was to the printed car-order forms which were physically present in the hearing room and upon which the car orders actually placed by Martin Brothers were reduced to writing, by Martin Brothers' employees (if placed in writing) or by Southern Pacific's agent (if placed orally).

stations on the railroad and check the preparation of the car demurrage sheets and also the underlying documents of the car orders to see that agents are complying with the preparation of those documents. I believe that was an auditor's marks."

Requiring a rail carrier to furnish cars on a basis other than specific car orders would seriously handicap the rail carriers in distributing cars from a practical viewpoint. A railroad company is a large organization composed of thousands of employees and serving thousands of different shippers. One employee of a carrier might be told one thing at one time, and another employee might be told another thing at another time. For a request for cars to be reasonable it should be made through the recognized channels in which cars are regularly ordered each day.

Moreover, it is not only uncontroverted but alleged that the complaint period was a time of general car shortage for which Southern Pacific was not responsible. We say uncontroverted because the findings of evidentiary fact to that effect by the Commission (reproduced *supra,* pp. 4-5) were originally made by the Examiner in his proposed report and yet no exceptions or objections to those findings were ever registered by Martin Brothers, either in its exceptions or petition for reconsideration before the Commission, or in the proceedings filed with the District Court. In such a period of general car shortage a rail carrier is inevitably subjected to continual and inflated demands for cars by all shippers. The record shows that Southern Pacific, during the complaint period, actually received "thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise," from other lumber shippers respect-

ing the car shortage (R. 616). In such circumstances, it was particularly necessary that bona fide orders for cars be placed through the definite and recognized channels in which cars were regularly ordered each day, i.e., by the placing of specific oral or written car orders with agents at the station at which the cars were needed for loading. Otherwise Southern Pacific would have been under a serious and substantial handicap in making an efficient and orderly distribution of the limited cars that were available.

Requiring a rail carrier to furnish cars without the placing of specific daily car orders would deny the carrier knowledge of what particular types of cars a shipper might require. In this case, the record shows that Martin Brothers required watertight box cars for the shipment of wire-bound boxes and veneer, but that gondolas or flat cars were acceptable for its shipments of lumber (R. 209). 52.7 percent of the cars furnished Martin Brothers were actually used for the shipment of wire-bound boxes, the balance being used for shipments of rotary-cut lumber and sawn lumber (R. 775). It certainly would be unreasonable, and an inefficient practice, to require a carrier to furnish a shipper one type of equipment for all of its shipments when it appeared that other types of equipment were equally acceptable for 47.3 percent of those shipments. Yet, in the absence of specific daily orders, how could Southern Pacific determine how many of the cars to be furnished Martin Brothers were required to be watertight box cars and how many could be other types of equipment? It is patently unreasonable, particularly in a time of general car shortage, for a shipper to fail to advise a carrier of all types of cars which would be equally acceptable for shipments on a particular day.

If a carrier were required to place cars on the basis of the potential capacity of a shipper and not on the basis of specific car orders, there would undoubtedly be certain days when the shipper would be unable to use all the cars furnished. Plant operations might be curtailed or prevented altogether at particular times by such factors as unfavorable weather conditions, labor disputes, machinery breakdowns or power failures. If a carrier were required to furnish a plant at such times with the full number of cars that the plant had a theoretical capacity to load, it might well result in such cars lying idle while at the same time other shippers in the same locality were unable to secure all the cars they actually needed. It was for this very reason that the Commission, in *Victor-American Fuel Co. v. Denver & S.L.R. Co.* (1926), 115 I.C.C. 169, criticized a carrier for distributing cars on the basis of capacity when that capacity exceeded specific car orders. Indeed, as shown *infra,* at page 48, Martin Brothers, during the 228-day complaint period held, without using, some 200 cars for periods ranging from three to eight days apiece.

A rail carrier should no more be required to furnish particular cars on particular days on the basis of casual advance general estimates of future needs, in the absence of a specific order, than would any other commercial enterprise be required to furnish goods or services in response to such general representations. Certainly, if a person constructing or leasing a building requiring a number of telephones should do no more than notify the telephone company that at some future, unspecified time he would need an unspecified number or type of telephones, such person would be in no position to complain against the failure of

the telephone company to effect the installation without specific request therefor.

The reasonableness of the practice of Southern Pacific of furnishing cars to shippers in general, and to lumber shippers in Oregon in particular, only upon the receiving of an "order" for the placing of a definite number and type of cars on a particular day, is attested by its consistency with the general rule, as expressed in *Corpus Juris Secundum,* that a shipper's request for cars "must be sufficiently specific reasonably to inform the carrier of what it is expected to do" and "must show definitely the number and character of cars desired and the time and place at which they are to be furnished." 13 *C.J.S.* Carriers, § 37a.

The general necessity for and sufficiency of a notice or request for cars is stated as follows in *American Jurisprudence* (9 *Am. Jur.* Carriers, § 336):

> "A necessary corollary of the rule that a carrier is allowed a reasonable time within which to supply cars is that the carrier is entitled to reasonable notice of a shipper's demands before it can be held liable for any failure or delay in satisfying them. Accordingly, a shipper cannot hold the carrier liable for a failure to furnish cars, unless he can show that he made a suitable and proper application therefor, which means that he must show not only a tender to, or receipt of property for shipment by, an authorized agent of the carrier or an application to such an authorized agent for a car, but also due compliance with any statutory regulations or any reasonable rules of carriage in respect thereto."

These statements of principle are well supported by decisions of the courts and the Interstate Commerce Commission.

In *Koepp v. New Orleans G.N.R. Co.* (1926), 162 La. 487, 110 So. 729, the plaintiff shipper brought suit to recover damages caused by the alleged failure of the defendant rail carrier to furnish cars required for the transportation of lumber and piling during a particular 10-month period. The trial court awarded a judgment in the plaintiff's favor, but the Supreme Court of Louisiana, in reversing that judgment, said (110 So. 730-731):

> "The plaintiff claims, according to testimony offered in its behalf, that after the defendant retook possession of its line of railroad at the termination of government control on March 1, 1920, it placed a standing order with the defendant for four cars daily, and, from time to time, gave special orders for additional cars, running on occasions as high as ten cars a day. This testimony is controverted by the defendant.
>
> We do not think the evidence in the record is sufficient to support the claim of the order by plaintiff of four cars daily. But, if it be conceded that such an order was given, the order itself was too indefinite to serve as the basis of an action for damages for the failure to furnish the cars.
>
> The evidence does not show the kind of cars needed, or how many were required for carrying lumber, or how many were required for carrying piling, a different character of car being required for the transportation of each of said commodities. The nature of the business is such and the duty of furnishing safe cars is such as renders it necessary for railroad companies to know what is to be loaded on the cars so that they can be provided to suit the occasion. Since different cars were needed, defendant was entitled to such reasonable notice of the particular kind and number of each desired as would enable it to supply the demand.

> It would be unreasonable to tie up the equipment of a railroad company to respond to the demand for cars by one shipper without regard to a present necessity therefor. When a demand is made upon a carrier for the performance of a public duty, the demand should be specific enough to reasonably inform the carrier of what it is expected to do. See Simmons v. Seaboard Air Line R. Co., 133 Ga. 635, 66 S.E. 783."

In *Simmons v. Seaboard Air Line Ry.* (1909), 133 Ga. 635, 66 S.E. 783, the plaintiff, operator of a sawmill, sought to recover damages from the defendant rail carrier on the ground that it had failed in its duty of supplying cars for the shipment of freight, "thus rendering it impossible for the plaintiff to send 'lumber, wood, and slabs' to his customers." The plaintiff alleged that early in the month of January 1906 he had given defendant's agent a standing order for five cars per day. The court, in holding that this order was too indefinite to provide a basis for a suit for damages for a failure to furnish cars, said (66 S.E. 784):

> "It was alleged that the freight to be transported consisted of lumber, wood, and slabs, and that the demand upon the defendant was 'a standing order * * * for five cars per day'; but the order did not specify the character of the cars needed, or how many were required for transporting lumber, or how many for wood, or how many for slabs. It is not alleged that the same character of car would be suited to the purpose of carrying each of the several articles proposed to be loaded on the cars. The character of the business is such, and the duty of furnishing safe cars is such, as renders it necessary for the railroads to know what is to be loaded on the cars, so that they can be provided to suit the occasion. It appears from the petition that lumber, wood, and slabs

are different articles, and it might require different kinds of cars in which to carry them. The petition is to be construed most strongly against the plaintiff; and in view of the demurrer, and the failure to allege that the same cars were suited to carrying all of the commodities, it may be presumed that different kinds of cars were needed. If they were, then the defendant was entitled to such reasonable notice of the particular kind of cars and the number of each desired as would enable it to supply the demand. It would be unreasonable to tie up all the equipment of a railroad company to answer the beck and call of one of its customers, without regard to a present necessity therefor; and when a demand is made upon such company for the performance of a public duty, the demand should at least be so specific as to reasonably inform the company of what it is expected to do."

The District Court attempts to distinguish both the *Koepp* and *Simmons* cases on the ground that the shippers in those cases required different types of cars for the commodities shipped and that in the present case box cars were suitable for all of Martin Brothers' shipments. But, as shown *supra* p. 22, although Martin Brothers required watertight box cars for the wire-bound boxes and veneer constituting 52.7 percent of its shipments, flat cars or gondolas were equally acceptable for the other 47.3 percent of its shipments. Particularly in a time of car shortage, a carrier should be given information as to all types of equipment which would be acceptable for shipments and not limited arbitrarily to one particular type merely because the shipper fails to place specific car orders. To have required Southern Pacific to furnish box cars for shipments

for which flat cars or gondolas were equally acceptable falls within the court's condemnation in the *Koepp* case (110 So. 731):

> "It would be unreasonable to tie up the equipment of a railroad company to respond to the demands for cars from one shipper without regard to a present necessity therefor."

Moreover, regardless of the fine factual distinction that might be attempted to distinguish the *Koepp* and *Simmons* cases, they clearly express and apply the rule that a rail carrier's duty to furnish cars is conditioned upon its receiving specific car orders.

In *Di Giorgio Importing & S. Co. v. Pennsylvania R. Co.* (1906), 104 Md. 693, 65 Atl. 425, the plaintiff sought to recover damages for losses alleged to have resulted from the defendant rail carrier's failure promptly to furnish cars for the transportation of fruit. The plaintiff had filed a requisition for cars to be loaded with fruit arriving on certain vessels that were due during the next week, but the defendant rail carrier was not advised of the exact arrival time of the vessels. The court, in affirming a trial court judgment in favor of the defendant rail carrier, held (65 Atl. 429):

> "There is no evidence that defendant had notice in fact from the Chamber of Commerce, or from any source, of the approach or expected arrivals of these vessels, and it cannot be held, under the circumstances of this case, to be their duty, to keep some one on watch at the Chamber of Commerce for that purpose. As was said in Ayres v. Chicago, 71 Wis. p. 380, 37 N.W. p. 436 (5 Am. St. Rep. 226), 'the plaintiff had no reason to insist upon or expect compliance except upon giving rea-

> sonable notice of the time when they would be required. It must be remembered that the defendant has many lines of railroad scattered throughout several distant states, and many stations of more or less importance. * * * No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along such different lines of railroad, loaded or unloaded.' "

Not only does this holding by the court support the propriety of the practice followed by Southern Pacific of furnishing cars to shippers in general, and to Martin Brothers in particular, only upon the receiving of a specific order, but the factual situation in the *Di Giorgio* case was actually more favorable to the shipper there concerned than the factual situation in the present case is to Martin Brothers. The placing of a request for cars upon the arrival of a vessel due the very next week bears more resemblance to a specific request than do the estimates of Martin Brothers (discussed *infra,* p. 37) that 8 to 10 cars per day would be needed "after we get our wire-bound boxes into operation on one shift," 11 to 13 cars per day "after we get our wire-bound boxes into operation on two shifts," and 13 cars per day "after we get our wire-bound boxes into operation on three shifts," particularly when each of those estimates is in direct conflict with other estimates. Just as the court held in the *Di Giorgio* case that it was not the duty of the carrier "to keep someone on watch" to determine the time of arrival of the designated vessels, so also it was not the duty of Southern Pacific to keep someone on watch to determine when Martin Brothers started its wire-bound box

production and whether it was operating on a one-shift, two-shift or three-shift basis.

The Commission decision here under review is fully consistent with the Commission's own previous decisions. Although the District Court attempts to distinguish certain of those decisions on the ground that they "do not even remotely involve the problem before us" (R. 59), the fact is they all express and involve some direct application of the principle that a carrier is not obligated to furnish cars unless it receives a specific request from a shipper.

In *Woolley Co. v. Southern Ry. Co.* (1925), 96 I.C.C. 161, the complainant Woolley Company alleged that it had been damaged as the result of the failure of the defendant rail carrier to furnish its mine with a reasonable car supply during portions of 1922 and 1923. The car records of the defendant carrier showed that during October and November 1922 the Woolley Company regularly placed specific car orders with the defendant. Those records also showed that during the first three days of December 1922 the Woolley Company ordered 14 cars and was furnished 14 cars, and on December 14 ordered a single car, which was furnished. The company's mine was closed on and after December 4, 1922, which it contended was due to an inadequate car supply, and no specific car orders were placed (except the one on December 14). On the basis of these facts the complainant shipper sought damages for the period to and including March 31, 1923, "on the theory that by shutting down the mine it was fulfilling its duty of lessening the amount of damage sustained." The Commission, in dismissing the complaint, said (p. 165):

> "Certainly, the carrier's duty to furnish transportation does not arise until request is made therefor. Here no

request was made, therefore no liability for failure to furnish cars arose."

In *Winter's Metallic Paint Co. v. Chicago, M., St.P. & P. Ry. Co.* (1923), 87 I.C.C. 113, the complainant shipper alleged that during November 1922 the defendant rail carrier failed to furnish cars upon reasonable request, in violation of Section 1 of the Act, thereby subjecting him to injury, and sought the recovery of reparation. The complainant showed that during November 1922 its plant had 350 tons of paint pigments available for sale and shipment and that during that month only 170 tons were sold and shipped in four cars furnished by the defendant, and contended that the remainder might have been sold and shipped at a net profit of $10 a ton if it had been furnished the necessary cars. The record made before the Commission showed that during November 1922 the complainant placed with the defendant carrier four specific car orders for the four cars which it actually received, but failed to place specific car orders for any additional cars. The complainant sought to excuse this failure by contending that "there was no use in ordering five or six cars, or three or four, when we couldn't get one." The Commission, in dismissing the complaint, held that the defendant rail carrier "could not be expected to furnish equipment which complainant had not ordered" and "The sole question presented for determination is whether the cars ordered were furnished within a reasonable time after defendant received the orders."

In *Sample v. Atchison, T. & S.F.Ry.Co.* (1928), 139 I.C.C. 324, in which it was also alleged that the defendant rail carriers failed to furnish sufficient cars, the Commission

referred to the fact that the duty of the carrier was "to provide and furnish transportation upon reasonable request therefor", and went on to say that "In order that the request may be reasonable it should be made far enough in advance of the time when cars are actually required for loading to enable the carriers when exercising due diligence to distribute the available cars equitably and fairly among shippers." (p. 330)

A converse situation was before the Commission in *Victor-American Fuel Co. v. Denver & S.L.R.Co., supra* (115 I.C.C. 169), in which it was shown that a rail carrier was furnishing a shipper *more* cars than those for which it had placed specific car orders, the number furnished being the shipper's potential shipping capacity. The Commission applied the same general principle expressed in the previous cases to condemn this practice of the carriers as follows (pp. 173-174):

> "Obviously the mine's order represents its maximum need on any day. To ignore the order when for less cars than the rating [based on capacity], and use the rating in lieu thereof, as the basis for car distribution, constitutes an unreasonable and wasteful practice. It here resulted in the furnishing to certain mines of more cars than they could use at times when other mines served by the railroad were being deprived of their ratable requirements for cars.
>
> It is a well-recognized principle that a carrier's duty to furnish transportation does not arise until request is made therefor. Paragraph 4, of section 1 of the act, provides:
>
> It shall be the duty of every common carrier subject to this Act engaged in the transportation of pas-

sengers or property to provide and furnish such transportation upon reasonable request therefor.

The shipper's request for transportation, when properly made, is his need and is the measure of the carrier's responsibility to him." (Emphasis supplied.)

Such a long-continued and uniform action of the Commission in holding that a carrier is obligated to furnish cars only upon the placing of specific day-to-day car orders is persuasive determination that such is the proper construction of Section 1 of the Interstate Commerce Act. *United States v. Minnesota* (1936), 270 U.S. 181, 205; *New York Cent. Securities Corp. v. United States* (1932), 287 U.S. 12, 24.

Therefore, all available criteria make it abundantly clear that, to have been "reasonable", the requests of Martin Brothers for the furnishing of cars should have been sufficiently specific to indicate a definite number and type of cars desired on a particular day. The record shows without conflict that Martin Brothers actually did receive all the cars for which it placed such specific requests. Exhibit No. 8 before the Commission (R. 748-759), prepared and presented by Mr. W. F. Forrest, a witness for Martin Brothers, is a summary of all of the specific car orders placed by Martin Brothers during the nine-month complaint period. This exhibit, which has separate columns entitled "No. of Cars Ordered", "Date Ordered", "Date Wanted", "No. of Cars Received" and "Date Cars Received", shows that Southern Pacific supplied Martin Brothers with all of the cars for which it placed specific orders.

The other acts relied upon by Martin Brothers as constituting requests for cars in addition to those actually re-

ceived, did not constitute reasonable requests; i.e., they were not specific day-to-day requests for a definite number and type of cars on a particular day. A review of those other acts follows.

Martin Brothers presented evidence that in February, 1946, prior to the purchase of the Oakland plant, the president of Martin Brothers, in a conversation respecting its prospective operation of the plant with a Southern Pacific representative, stated what he expected its car requirements would be, both for the present and after the completion of a projected expansion of the plant, and that he was assured by the Southern Pacific representative that cars "could" be furnished (R. 146-148). This conversation, which occurred at least ten months prior to the beginning of the complaint period, was certainly not a specific order for the furnishing of a definite number and type of cars on a particular day. Indeed, this was so conceded by Martin Brothers' counsel, Mr. George L. Quinn, Jr., on oral argument before the Commission in the following colloquy between Commissioner Hugh W. Cross and Mr. Quinn (R. 681-682):

> "Commr. Cross: * * * You do not think verbal representations at that time were binding in any way, do you?
>
> Mr. Quinn: No, sir. * * *
>
> Commr. Cross: This is a representation made before the plant was put into operation. I am simply asking the question whether there is anything binding in the conversations that may have taken place?
>
> Mr. Quinn: I think legally not; no, sir."

Nor can this conversation be construed as having given rise to any contract obligating Southern Pacific to furnish cars. A rail carrier lacks the power to bind itself by contract

to furnish an absolute car supply to any particular shipper, because it would impose an obligation greater than its common-carrier obligation and result in undue discrimination. *Davis v. Cornwell* (1924), 264 U.S. 560, 561.

Martin Brothers presented in evidence letters dated July 30, 1946, and August 6, 1946, addressed to one of Southern Pacific's District Freight Agents at Los Angeles and Southern Pacific's Perishable Freight Traffic Manager at San Francisco, complaining of the insufficiency of the car supply Martin Brothers was then receiving and stating that its maximum car needs were 36 cars a week or 150 cars a month and that "Over the long pull for the next several years" it would require about 250 cars per month. These letters, written some five months prior to the beginning of the complaint period, cannot be construed as specific requests for the furnishing of a particular number of cars on a particular day, and their relevancy, if any, is confined to putting Southern Pacific on general notice that in the future cars would be ordered by Martin Brothers and of the capacity of the mill at Oakland. Moreover, neither Southern Pacific's Perishable Freight Traffic Manager at San Francisco nor one of its District Freight Agents at Los Angeles had any authority or duty with respect to the furnishing of cars.

Martin Brothers also presented evidence of various general complaints as to the adequacy of the car supply it was receiving as made on its behalf on undisclosed dates. None of these complaints constituted specific orders for the placing of a definite number of cars on a particular date. They rather constituted the same general type of complaint which Southern Pacific was receiving from other Oregon lumber shippers during the same period. Witness F. C. Nelson testified (R. 616):

"Q. [By Mr. Wedekind] Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30 inclusive, 1947?

A. Yes we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July, 1947 to October, September, and the rest of the year, why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.

Q. What was the general nature of those complaints?

A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem, Eugene, Medford, were also receiving complaints in countless numbers."

The aforesaid conduct of Martin Brothers, as relied upon as constituting reasonable requests for cars, bears a definite similarity to the condemned conduct of the shipper in *Koepp v. New Orleans G.N.R.Co., supra* (110 So. 729, 730), described by the court as follows:

"Plaintiff kept no record of the special orders for cars that it claims to have given the defendant. Its witnesses testify, merely in a general way, that such orders were given to the agent at Ramsey, the railroad

station nearest plaintiff's mill, to conductors and brakemen on freight trains, by school children, and by telephone messages to and occasional interviews with certain employees and officials of the company."

That the various acts of Martin Brothers to which we have referred can not be rationally considered a substitute for specific day-to-day car orders is substantiated by their vague and inconsistent character, which is well illustrated in the following table summarizing the various conflicting estimates as to car "requirements" made by Martin Brothers between January 1 and August 6, 1946, and placed in the record by witnesses for Martin Brothers.

No. of Cars	Time When "Needed"	Record Reference
5 to 6 per day	"Until we get our wire-bound box production started"	R. 148
8 to 10 per day[10]	"With one shift after we get our wirebound box production started"	R. 148-149
11 to 13 per day[11]	"With two shifts after we get our wirebound box production started"	R. 148-149
6 to 11 per day	"With two shifts"	R. 223
13 per day	"With three shifts"	R. 223
36 per week	"Our immediate need"	R. 777
"Considerably more"	"Later on"	R. 777
150 per month	"For the time being"	R. 780
250 per month	"Over the long pull"	R. 780

Not only are these estimates indefinite and conflicting, but some necessarily depended for application on determinations peculiarly respecting Martin Brothers' business, i.e., whether Martin Brothers had commenced its wirebound box

10. The 5 to 6 cars shown in line 1 of the table, plus 3 to 4 cars for one additional shift.

11. The 5 to 6 cars shown in line 1 of the table, plus 3 to 4 cars for each of two additional shifts.

production and whether Martin Brothers was carrying on a one-, two- or three-shift operation. These are clearly not matters which Southern Pacific was under any duty to investigate.

Furthermore, the estimates in the above table are indefinite as to the calendar dates for which they were to apply. Certainly, these estimates, made from January to August 1946, could not rationally be construed as constituting any specific order for a definite number of cars on January 2, 1947, the first day of the complaint period, or on any other day of that nine-month period. Indeed, the various estimates of Martin Brothers set forth in the above table afford persuasive confirmation for the testimony of Southern Pacific's witness F. C. Nelson that "the Martin Box Company or representatives of the Martin Box Company gave me a lot of information as to how many cars they wanted at Oakland, but rarely ever did I get two alike" (R. 609) and "There seems to be some confusion in the Martin Brothers organization as to how many cars they wanted" (R. 610).

Although Martin Brothers seeks to recover damages for an alleged failure to furnish it cars which it claims should have been supplied to it in a time of car shortage, the conduct of Martin Brothers during that time was not of a kind to aid in mitigating the difficulties confronting a carrier and its shippers. Martin Brothers made general and conflicting statements as to its requirements; it almost inexplicably refrained from making specific requests for the additional cars now claimed to have been required through the use of car orders, although admonished to do so; and it cancelled specific car orders and failed to use promptly the cars which were supplied to it. All of these facts were shown in the record before the Commission and are developed in

this brief. It is in the face of these failures by it that Martin Brothers seeks to recover damages because of alleged violation of the Interstate Commerce Act.

Even the fundamental theory of the case presented by Martin Brothers sustains the propriety of the Commission's ultimate finding. That theory is that Martin Brothers made reasonable request for, and should have received, 8.4 (8-4/10) cars on each working day of the complaint period (R. 775). Its very ambiguity makes such a request unreasonable. If such a request legally bound Southern Pacific to furnish 8.4 cars on each day of the complaint period, was Southern Pacific bound to furnish 9 cars per day, or 8 cars per day, or was it bound arbitrarily to select six days out of each ten-day period on which to furnish 8 cars and four days on which it would furnish 9 cars? The patent ambiguity of a request for "8.4" cars prevents it from being a reasonable request.

Thus, it is clear that the record indeed contains substantial evidence to support the Commission's ultimate finding that Southern Pacific did not engage in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act.

We shall now take up specifically the reasons advanced in the District Court's opinion in support of its judgment setting aside the Commission's decision, so far as they pertain to this finding by the Commission. Those reasons consist of comments and criticisms by the Court upon what it refers to as the "conclusions" of the Commission, which are quoted by the Court as numbered subheadings in its opinion (R. 57 *et seq.*) These actually are merely statements of evidentiary fact which led to the Commission's ultimate finding

that Martin Brothers had failed to establish any unreasonable or unlawful practice by Southern Pacific in violation of Section 1.[12] In fact, these statements by the Commission fully support its ultimate finding; and not only does the District Court's opinion fail to show otherwise, but it also gives the clue to the Court's fundamental misapprehension which prompted it to set aside the Commission's decision upon an issue of fact concerning transportation practice. For convenience, we shall discuss the comments and criticisms of the Court under the numbered subheadings used.[13]

Subheading I is a quotation of the Commission's statement:

> "The evidence establishes that, from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced;" (R. 57.)

After discussing this statement the court concludes (R. 61):

> "None of the cases upon which defendant relies support its contention that plaintiff's requests for cars were insufficient because of lack of specificity or that such requests were not reasonable requests within the meaning of the Act.

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12. The distinction between findings of ultimate fact and statements of evidentiary or primary facts is referred to *supra*, p. 14.

13. We here discuss the Court's comments and criticisms under subheadings I to V and VII, which pertain to the Commission's ultimate finding that Southern Pacific did not engage in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act. Those under subheadings VI and VIII pertain to other ultimate findings and are discussed *infra* in section C (p. 46) and section D (p. 51), respectively, of this argument.

> In my opinion, the portion of the Commission's conclusions relative to written car orders has no bearing on any issue of this case and, if the Commission did premise its dismissal of plaintiff's complaint on this portion of its conclusions, then it is erroneous as being contrary to law."

As we have shown *supra,* the courts have definitely and almost universally recognized that a carrier's duty to furnish cars is conditioned upon receiving reasonably specific requests therefor so that it may know the exact number and kind of cars to supply, and when. We have also developed the practical factors of empty-car distribution, which indicate that the rule of law as so recognized by the courts is but good common sense. Applying this rule of law or common sense to the case before us, it is the uncontroverted fact that Martin Brothers' day-to-day requests for cars of specified types at specified times were fulfilled by Southern Pacific, whether the specific orders were placed in writing by Martin Brothers or telephoned to and reduced to writing by Southern Pacific's agent (R. 748-759). Martin Brothers has not been able to point to any such orders which were not filled, but it did and could only point to the above-mentioned general representations made by it as to its car needs which were not filled by Southern Pacific. The Commission's ultimate finding rests upon the fact that these general representations were not reasonable requests for cars upon which the rail carriers' responsibility for furnishing cars is predicated. The Court in its opinion does nothing to refute this fact except to observe (R. 59) that "In the case at bar, the Southern Pacific knew that plaintiff wanted box cars." But so did all other shippers during this general car-

shortage period; and we have shown *supra,* page 22, that the record demonstrates that Martin Brothers could and did use other types of cars.

The District Court, in the paragraph last quoted from its opinion, finds fault with the Commission's reference in regard to "specific written car orders" and concludes that, insofar as the Commission may have required car orders to be written, its decision is contrary to law. If this sentence in the Commission's decision is regarded as being too restricted in requiring car orders to be written as well as specific, Martin Brothers was not harmed, because the record shows (see discussion *supra,* page 33) that Martin Brothers was furnished with all the cars for which it placed specific car orders, whether written by it or reduced to writing by the rail carrier's agent. The Court appears to lose sight of the fact that the burden was upon Martin Brothers, the complainant, to establish the case against Southern Pacific, the defendant, before the Commission. At the threshold of the case Martin Brothers had to show reasonable request upon Southern Pacific to furnish cars which were not furnished, and this it failed to do. For Martin Brothers to be entitled to have the Commission's decision on this ground set aside, it should show the Court that the evidence compelled the conclusion that there was reasonable request for freight cars other than the recorded car orders which Southern Pacific filled and that it did not receive all the available cars which it should have received. No such showing was made by Martin Brothers.

Subheading II is a quotation of the Commission's statement that "complainant desired, required, and attempted to secure additional cars from the defendant" (R. 61). This

was not a finding, or even a statement, by the Commission that Martin Brothers made reasonable requests for cars by placing specific car orders. Therefore, the Court was in error if it thought that this determination by the Commission was sufficient to dictate or support a recovery by Martin Brothers.

Subheading III is a quotation of the Commission's statement that "defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant" (R. 61-62). The Court then finds that there was "no substantial evidence" to support the Commission's determination (R. 63). In addition to other substantiating evidence of record, the Commission's determination is adequately and fully supported by the fact that Martin Brothers was furnished all of the cars for which it placed specific oral or written orders. In supplying Martin Brothers with all of the cars ordered, Southern Pacific supplied Martin Brothers with actually a greater percentage of its car orders than it supplied other shipping members of the lumber industry generally on the Portland Division during the same period. That is to say, Southern Pacific supplied Martin Brothers with 100 percent of the cars for which it placed car orders and yet supplied the other lumber shippers on the Portland Division with an average of only 80 percent of the cars for which they placed car orders (R. 797).

Subheading IV is a quotation of the Commission's statement that "by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it" (R. 63). This may be accepted as true; but it does not bear upon Martin Brothers' case against

Southern Pacific, and it was equally true as to all other lumber shippers on the Portland Division, who were supplied with an average of only 80 percent of the cars for which they placed car orders.

Subheading V is a quotation of the Commission's statement that "during 1947 the defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon the defendant" (R. 63-64). This determination by the Commission is found by the Court to be "amply" supported, and it removes from the case any claim of responsibility by Southern Pacific for the existence of a car shortage during the period in question, which was nation-wide in extent.

Subheading VII is a quotation of the Commission's ultimate findings that Martin Brothers had not established any violation of Sections 1 and 3 of the Interstate Commerce Act, as alleged (R. 69). As the Court has to its satisfaction disposed of the statements of the Commission adverse to Martin Brothers immediately preceding these findings of ultimate fact, it turns to consideration of "other evidence" of record.[14] It there undertakes to reject as without significance the evidence reviewed by the Commission as to the failure of Martin Brothers to use promptly all of the cars which were furnished to it. We reveal this evidence *infra,* page 48, as pertinent to the Commission's subordinate finding that "the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation." Obviously, it is pertinent to Martin Brothers' claim for damages on account of the alleged

14. That other evidence pertains only to the alleged violation of Section 1 of the Act.

failure of Southern Pacific to furnish cars, to show that Martin Brothers did not make use of all of the cars which were furnished with reasonable promptness. This evidence is also pertinent in regard to Martin Brothers' general estimates as to the number of cars needed. If Southern Pacific should be called upon (which we do not think was the case) to furnish cars to Martin Brothers in line with the latter's assumed requirements, as gleaned from its estimates and other evidence, it was appropriate to show the doubt that the undue retention of empty cars by Martin Brothers cast upon the extent of those asserted "requirements".

C. The Record Contains Substantial Evidence to Support the Commission's Ultimate Finding That Southern Pacific Did Not Subject Martin Brothers to Any Undue Prejudice.

The Commission in its report found "that it is not shown that defendant unduly favored shippers other than complainant" (R. 125) and that "complainant has failed to establish that defendant during the complaint period * * * subjected complainant to any undue prejudice in violation of section 3" (R. 126). These findings are supported by substantial evidence.

The record contains substantial evidence that Martin Brothers received, during the complaint period, treatment in car service at least equal to that accorded other lumber shippers in Oregon. As shown *supra,* page 18, Southern Pacific furnished no other shippers with more cars than those for which they placed specific oral or written daily orders. And, as shown in Martin Brothers' own Exhibit No. 8, Southern Pacific actually did furnish Martin Brothers with all the cars for which it placed such oral or written orders. This showing that Martin Brothers received equal

treatment with other Oregon lumber shippers constitutes substantial evidence to support the Commission's finding that Martin Brothers failed to establish that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3.

Under *subheading VI* of its comments and criticisms respecting the Commission's decision, the court states in its opinion: "I am of the opinion that there is no substantial evidence upon which the Commission could have concluded that the 'defendant did not unduly favor shippers other than the complainant' " (R. 64-69). In an attempt to support this conclusion the Court states that the record shows that, on the one hand, during the complaint period, all shippers on the Portland Division were furnished an average of 80 percent of the cars ordered by them and that, on the other hand, Martin Brothers received a much smaller proportion of its alleged requirements, as indicated in the various general letters and oral communications to which we have referred. Passing for the moment the Commission's and our view that such general expressions of asserted requirements did not constitute car orders as would be required to put Southern Pacific in default in not furnishing cars, it is apparent that the Court has not compared like things. The only record made of cars ordered by other shippers consisted of specific orders which had been placed for particular cars at particular times on the Portland Division. If that is compared with the specific orders of such cars placed by Martin Brothers, it appears that it received more cars than were generally received by other shippers on the Portland Division. If it is sought to compare the number of cars furnished in respect of general representations as to requirements, it would be necessary, on the one hand, to ascertain what the

requirements amounted to on the Portland Division, as indicated by general representations as to capacities and requirements, and what percentage thereof were filled, and, on the other hand, what the general expressions as to requirements by Martin Brothers were and the portion thereof filled. The record shows that there were continual demands for more cars during the period of car shortage throughout the Portland Division, but there is nothing in the record to show the relationship of cars supplied on the Division to the total requirements or shipping capacities of all shippers.

D. The Record Contains Substantial Evidence that Martin Brothers Did Not Suffer Damages as Alleged.

The Commission's ultimate findings that Martin Brothers failed to establish that Southern Pacific, during the complaint period, engaged in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Interstate Commerce Act, in furnishing or not furnishing cars to Martin Brothers, or that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3, are also sustained by and consistent with the Commission's finding that "the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation", which is in turn supported by substantial evidence. That substantial evidence consists of uncontradicted showings of record that during the complaint period Martin Brothers held many cars of all types for three or more days (excluding Sundays and holidays) after they had been placed on its spur track at Oakland. The extent to which Martin Brothers engaged in this practice is shown in the following table, which summarizes cars so held for

loading by Martin Brothers during the 228-day complaint period:[15]

Class of Car	Held 3 Days	Held 4 Days	Held 5 Days	Held 6 Days	Held 7 Days	Held 8 Days	Total
Box	55	25	9	4	2	1	96
Auto	31	27	6	3	—	—	67
Refrigerator	11	4	4	3	—	—	22
Stock	1	2	1	1	—	—	5
Gondola	2	—	1	—	—	—	3
Flat	4	2	1	—	—	—	7
All classes	104	60	22	11	2	1	200

(R. 818-843)

This holding of 200 cars, as shown by this table, for periods ranging from three to eight days during the 228-day complaint period constitutes substantial evidence rebutting the contention of Martin Brothers that it was *in fact* damaged as a result of not receiving 8.4 cars on each of its working days during the nine-month complaint period.

The Commission in its report described this showing as set forth in the above table and recognized it as "relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished" (R. 121). Yet the District Court in its opinion categorically rejects this substantial evidence so considered by the Commission, as follows:

> "In my opinion the Commission did not intend to support its conclusions by the statements or findings hereinbefore set forth." (R. 71)

After expressing such a gratuitous conclusion the court refers to certain factors as indicating the "lack of any probative value" of this evidence. Not only does this constitute a definite "weighing" of the evidence by the District Court,

15. The days shown include the last day but not the time the car was on hand prior to the first 7:00 a.m., and exclude Sundays and holidays.

but certain of the factors so referred to by the court contain statements contrary to and unsupported by the evidence of record. The Court states:

> "Of the 664 cars furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than three days, when the daily 7 a.m. track check was made." (R. 72)

But an analysis of the exhibit presenting this showing (R. 818-843) definitely discloses that 104 cars were held by Martin Brothers for three days, excepting Sundays and holidays, following the first 7:00 a.m. after placing, 60 cars were held for four days, 22 cars were held for five days, 11 cars were held for six days, 2 cars were held for seven days, and 1 car was held for eight days. For example, car GN-25173, shown at page 1 of the exhibit under January 8, 1947, was placed some time before 7:00 a.m. of that date but the car was not released by Martin Brothers and did not move out until 7:00 a.m. on January 13, 1947 (R. 818). Thus, the car was actually held six calendar days, but is shown in the table as being held only four days, because the first day is excluded from the figure and one of the intervening days was a Sunday—Sundays and holidays being withheld from all computations of the days cars were held.

The District Court also states that a number of the cars set forth in the above table "were of limited value" to Martin Brothers because of destination restrictions (R. 72). Yet Martin Brothers' president, Mr. F. G. Martin, conceded that no cars loaded by Martin Brothers were ever restricted to any particular destinations. Mr. Martin testified:

> "Examiner Hanson: Did the railroad ever refuse to accept a car that you had billed to a foreign destination?

The Witness: After it was loaded?

Examiner Hanson: When you presented the car and gave them the shipping papers.

The Witness: Not that I know of, not that I can remember." (R. 228)

"Examiner Hanson: They [Southern Pacific] never required you to ship anywhere?

The Witness: No." (R. 226)

Moreover, although the Court refers to certain destination limitations as applying to automobile and refrigerator cars, it is apparent from the showing summarized in the above table (page 48) that less than half of the cars thus held by Martin Brothers for excessive periods were of those two types.

The District Court also states that "Some of the entries in exhibit 42 [R. 818-843] are inconsistent with the defendant's exhibit 40 [R. 804-816]." This is an attempt by the Court to compare unlike situations, because these two exhibits do not purport to constitute the same type of showings: the car statistics of Exhibit No. 42 have their origins in a daily 7:00 a.m. yard check, while the statistics in Exhibit No. 40 were compiled from the original car orders placed with Southern Pacific by Martin Brothers and are not tied down to a 7:00 a.m. time.

The aforesaid statements by the District Court in criticism of Exhibit No. 42, in addition to being contrary to and unsupported by the evidence, reveal by their very content that the Court is attempting to weigh the evidence—a function which it is not the Court's to perform.

Other substantial evidence showing that Martin Brothers was not damaged as alleged is contained in *Martin Brothers' own Exhibit No. 8* before the Commission (R. 748-759),

in which Martin Brothers candidly shows that it cancelled certain of the car orders placed by it during the complaint period. That exhibit shows:

Order of Feb. 19, 1947, for 3 cars wanted Feb. 22, 1947, "cancelled"
Order of Feb. 26, 1947, for 2 cars wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Apr. 14, 1947, for 2 cars wanted Apr. 16, 1947, "cancelled for one car"
Order of Apr. 14, 1947, for 1 car wanted Apr. 17, 1947, "cancelled"
Order of June 30, 1947, for 1 car wanted June 30, 1947, "cancelled"
Order of July 2, 1947, for 1 car wanted July 7, 1947, "cancelled"
Order of July 11, 1947, for 1 car wanted July 16, 1947, "cancelled"

Again, this cancelling of car orders on these various days during the complaint period constitutes substantial evidence rebutting the contention of Martin Brothers that it was damaged as a result of not receiving 8.4 cars on each working day of that period; for, clearly, if Martin Brothers were unable to load the cars it actually already had on its spur tracks, it was in no position to demand delivery of still more cars.

Under *subheading VIII* of its comments and criticisms respecting the Commission's decision, the Court in its opinion criticizes the Commission's finding that the record does not support an award of reparation (R. 73). This criticism of the Court rests solely on the ground that the evidence affords a basis for determining the "amount" of the damages allegedly sustained by Martin Brothers. In this criticism not only does the Court err because the record affords substantial support for a determination that Martin Brothers failed to establish with any reasonable exactitude the amount of damages allegedly sustained, but it also errs in failing to recognize that the *fact,* as well as the *amount,* of damages must be proved. As the Supreme Court said in *Pennsylvania R.Co. v. International Coal Co.* (1913), 230

U.S. 184, 204, with respect to an action for damages under the Interstate Commerce Act:

> "The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." (Emphasis by the Court.)

Certainly, the failure of Martin Brothers to use some 200 cars for periods ranging from three to eight days during the 228-day complaint period, and the cancelling of orders for cars on many days of the complaint period, constitute substantial evidence that Martin Brothers was not *in fact* damaged as alleged.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded with instructions that the Court enter a judgment sustaining the validity of the report and order of the Interstate Commerce Commission and dismissing the action.

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San Francisco, California,
April 9, 1954.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon counsel for appellee by mailing, by first-class mail, three copies thereof addressed to Messrs. Irving Rand and Donald A. Schafer, Public Service Building, Portland 4, Oregon, and one copy thereof addressed to Mr. George L. Quinn, Bowen Building, Washington 5, D.C.

Dated at San Francisco, California, this 9th day of April, 1954.

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